

DEC 12 2005**CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS****NOT FOR PUBLICATION****UNITED STATES COURT OF APPEALS****FOR THE NINTH CIRCUIT****KENNETH TOWNSEND,****Petitioner - Appellant,****v.****JIM HAMLET, Warden,****Respondent - Appellee.****No. 03-16189****D.C. No. CV-01-01054-MJJ****MEMORANDUM***

**Appeal from the United States District Court
for the Northern District of California
Martin J. Jenkins, District Judge, Presiding**

Submitted December 5, 2005**

Before: GOODWIN, W. FLETCHER, and FISHER, Circuit Judges.

California state prisoner Kenneth Townsend appeals pro se the district court's denial of his 28 U.S.C. § 2254 habeas petition challenging his conviction for assault with a deadly weapon on a peace officer. We have jurisdiction under 28

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

** This panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

U.S.C. § 2253. We review de novo the district court's denial of a habeas petition, *Mendez v. Small*, 298 F.3d 1154, 1157-58 (9th Cir. 2002), and we affirm.

Townsend first contends that the state trial court violated his constitutional rights when it refused to instruct the jury on the use of excessive force by a police officer. We are unpersuaded. Although the trial court did not provide the specific instruction Townsend requested, it did provide the jury with numerous instructions regarding what is and is not permissible by a police officer in effectuating an arrest. Townsend has not demonstrated that the failure to provide the jury with his requested instruction had a "substantial and injurious effect or influence in determining the jury's verdict." *See Brecht v. Abrahamson*, 507 U.S. 619, 638 (1993).

Townsend's second contention, that he was denied due process when the trial court refused to allow a defense witness to testify, also fails because trial judges are given wide latitude to exclude evidence that is only marginally relevant. *See Crane v. Kentucky*, 476 U.S. 683, 689-90 (1986).

Finally, Townsend contends that it was error for the trial court to impose a five-year sentence enhancement based on the jury's verdict. The court's imposition of the sentence enhancement based on the verdict was not erroneous. *Cf. Hicks v. Oklahoma*, 447 U.S. 343, 347 (1980) (granting habeas relief because

the state court violated petitioner's "substantial and legitimate expectation" to a jury sentence and made a "wholly incorrect" finding that the error was harmless).

To the extent that Townsend's brief raises uncertified issues, we construe his arguments as a motion to expand the certificate of appealability, and we deny the motion. *See Hiivala v. Wood*, 195 F.3d 1098, 1104-05 (9th Cir. 1999) (per curiam); 9th Cir. R. 22-1(e).

Townsend's motion to stay proceedings is denied.

AFFIRMED.